

No. 48332-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BA & C PROPERTY MANAGEMENT, LLC, Appellant,
v.
CITY OF LAKEWOOD, Respondent

REPLY BRIEF OF APPELLANT

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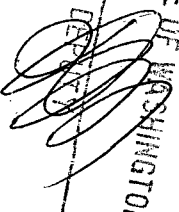
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I. ARGUMENT

A. Citations to Record in Matter Dismissed on the Pleadings

Respondent argues in its brief that this appeal should be denied because Appellant failed to include specific citations to the record below. There is only one citation to the record, which if not stated directly in Appellant's brief is certainly implied, and that is the Petition filed by Appellant to commence this action. CP 1-7. Motions to dismiss under CR 12(b) are based upon the pleadings and the pleadings alone. There is no record relevant to the appeal other than the Appellant's petition.

B. Appellant's Allegations Set Forth in Its Petition Support the Granting of the Relief It Requested in the Petition.

For purposes of deciding a motion to dismiss under 12(b), all of the factual allegations in Appellant's petition are accepted as true. *Dennis v. Heggen*, 35 Wn. App. 432, 667 P.2d 131 (1983). In considering such a motion, Washington courts have said "it must appear beyond doubt that the plaintiff[] can prove no set of facts consistent with the complaint which would entitle them to relief." See, e.g., *Id.* at 419; see also Karl B. Tegland & Douglas J. Ende, Washington Handbook on Civil Procedure, Vol. 15A, P. 292, (2011-2012) (allows a party to dismiss a claim only "when it is clear that the plaintiff will never prevail regardless of the facts proven at trial."). In other words, in the case that commentator Karl Tegland refers to as "the leading modern case" on this point, "[a]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is

legally sufficient to support plaintiff's claim." *Bravo v. Dolsen Co.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Dismissal under CR 12(b) is a drastic remedy granted only sparingly and with care, for the effect of granting the motion is to deny the plaintiff his or her day in court. *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 628 P.2d 855 (1981). Furthermore, Plaintiffs should be freely allowed to amend the complaint in lieu of a dismissal, if it appears that by doing so the plaintiffs may state a cause of action. CR 15(a); *Caruso v. Local Union No. 690*, 100 Wn.2d 343 (1983).

C. The Scrivener's Error in the Title to the Petition—Identifying the Document as a Petition for Writ of "Certiorari" Does Not Affect the Fact that the Petition Properly Alleged Facts that Support Its Request for the Remedies of Writs of Prohibition and Mandamus.

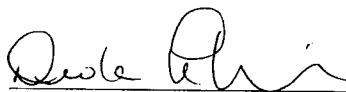
Although Appellant's Petition was entitled one "for a writ of certiorari" the allegations set forth and remedies requested therein clearly establish that the petition was for writs of prohibition and mandamus. Washington Superior Court Civil Rule 10 provides guidance for pleading format, including that: "All pleadings under the space under the docket number **should** contain a title indicating their purpose and party presenting them." CR 10(e)(2). (emphasis added). Given the clear intent of the petition, the title's error is not fatal, and Respondent provides no authority to the contrary.

II. Conclusion

As Responded in the court below, it seeks to redefine the case in a

manner inconsistent with the allegations and remedies sought in Appellant's petition as one seeking review of the decision of its Hearings Officer/Building Official. Appellant acknowledges that its opportunity to appeal that administrative decision had passed and that it may not now (or at the time of filing its petition) challenge that decision. Appellant's petition did not seek review of that decision. What Appellant sought in its petition was to hold Respondent City of Lakewood accountable for the representations made to Appellant that induced Appellant to forego exercising its right to review of that administrative decision and to enforce compliance with promises made by Respondent upon which Appellant relied by not pursuing review of the administrative decision. Appellant properly alleged facts in its petition over which the court had subject matter jurisdiction and for which the remedy Appellant sought should be granted based upon those allegations. Accordingly, it was error for the lower court to dismiss Appellant's petition under CR 12(b).

Respectfully submitted,



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